Supreme Court, U. S.
FILED
DEC 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5741

WAYNE EUGENE RITTER, PETITIONER,

V.

STATE OF ALABAMA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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INDEX

Page:

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutory provisions involved 3

Statement of the case 3

How the federal constitutional issues were raised and decided below 5

Reasons for granting the writ 5

I. Alabama's Statutory Death-Sentencing Procedure Raises Substantial and Literally Vital Federal Constitutional Questions, For Its Provisions Are Inconsistent With the Applicable Capital Punishment Decisions of This Court 5

A. Alabama's Unique Statutory Prohibition, Which Precludes Juries In Capital Cases From Considering Factually Supported Lesser Included Offenses, Raises Substantial Questions Under the Due Process and Equal Protection Clauses and the Eighth Amendment. 5

1. The Due Process Violation 7

2. The Equal Protection Violation 9

3. The Eighth Amendment Violation 11

4. The Basis for Reviewing the Facial Validity of the Statute 12

B. The Role Alabama Has Assigned the Jury, Compelling It to Impose a Death Sentence Upon Every Defendant Convicted of a Capital Crime While Precluding It From Considering Mitigating Circumstances, Raises Substantial Questions Under the Eighth and Fourteenth Amendments. 14

C. Alabama's Procedure of Deferring the Trial Judge's Consideration of Aggravating and Mitigating Circumstances Until After the Jury Has Mandatorily Imposed a Sentence of Death Infringes a Capital Defendant's Right to Unprejudiced Sentencing in Violation of the Eighth and Fourteenth Amendments. 17

D. Alabama's Failure to Provide a System of Comparative Review of Sentences and to Empower Its Appellate Courts to Vacate Death Sentences in Appropriate Cases Raises Substantial Questions Under the Eighth Amendment. 21

Page:

E. The Overall Operation of Alabama's Death Penalty Statute Is So Prejudicial to the Rights of a Capital Defendant at Both the Guilt and Sentencing Stages as to Raise Substantial Questions Under Both the Eighth Amendment's Cruel and Unusual Punishment Clause and the Due Process Clause of the Fourteenth Amendment 23

II. The Decision Below, Finding No Error in the Trial Judge's Failure to Charge on the Elements of Robbery, Decides a Substantial Federal Question in a Manner Inconsistent With the Applicable Decisions of this Court 24

Conclusion 25

Appendices

Appendix A (Opinion of the Alabama Supreme Court in Ritter v. State)

Appendix B (Opinion of the Alabama Court of Criminal Appeals in Evans and Ritter v. State)

Appendix C (Opinion of the Alabama Supreme Court in Evans and Ritter v. State)

Appendix D (Opinion of the Alabama Court of Criminal Appeals in Ritter v. State)

Appendix E (Alabama Death Penalty Statute)

TABLE OF AUTHORITIES

CASES: Page:

Addington v. Texas, 99 S.Ct. 1804 (1979) 7, 20

Argersinger v. Hamlin, 407 U.S. 25 (1972). 13

Beck v. Alabama, 365 So.2d 1006 (Ala. 1978), cert. granted, 26 Cr. L. 4052 (October 9, 1979) 6

Boykin v. Alabama, 395 U.S. 238 (1969) 3

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 12

Cade v. State, 4 Div. 640 (Ala. Cr. App. Nov. 21, 1978). 23

Connally v. Georgia, 429 U.S. 245 (1977) 19

Dennis v. United States, 341 U.S. 494 (1951) 19

Dunn v. Blumstein, 405 U.S. 330 (1972) 10

Duncan v. Louisiana, 391 U.S. 145 (1968) 9

Evans and Ritter v. State, 361 So.2d 654 (Ala. Cr. App. 1977). 1

Evans and Ritter v. State, 361 So.2d 666 (Ala. Cr. App. 1978). 1

Fulghum v. State, 291 Ala. 7, 277 So.2d (1973) 6

Furman v. Georgia, 408 U.S. 238 (1972) 14, 19

Gardner v. Florida, 430 U.S. 349 (1977). 12, 18, 19, 20, 25

Gregg v. Georgia, 428 U.S. 153 (1976). 10, 11, 12, 15, 20, 21

In re Winship, 397 U.S. 358 (1970) 7, 10, 20, 25

Jackson v. Virginia, 99 S.Ct. 2781 (1979). 7, 20

Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, ___ U.S. ___ (1979) 4, 5, 11, 15, 17, 18

Joe v. United States, 510 F.2d 1038 (10th Cir. 1975) . . 8

Johnson v. Mississippi, 403 U.S. 212 (1971). 19

Jurek v. Texas, 428 U.S. 262 (1976). 10, 15, 16, 18, 20, 21, 22

Keeble v. United States, 412 U.S. 205 (1973) 8, 10, 11

Kyzer v. State, ___So.2d ___, 6 Div. 655 (Ala. Cr. App. Aug. 21, 1979) 20

Lewis v. State, ___So.2d ___, 4 Div. 611 (Ala. Cr. App. Sept. 4, 1979) 22

Lindsey v. Normet, 405 U.S. 56 (1972). 10

Lockett v. Ohio, 438 U.S. 586 (1978) 16, 23

Martin v. State, 5 Ala. App. 405, 286 So.2d 80 (Ala. Cr. App. 1973). 24

Page:

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 19

Miranda v. Arizona, 384 U.S. 436 (1966) 13

Mullaney v. Wilbur, 421 U.S. 684 (1975) 25

Papchristou v. Jacksonville, 405 U.S. 156 (1972). 13

Presnell v. Georgia, 99 S. Ct. 235 (1978) 20

Proffitt v. Florida, 428 U.S. 242 (1976). 10, 21, 22

Prothro v. State, 570 So.2d 740 (Ala. Cr. App. 1979). . . 3, 24, 25

Ritter v. State, 375 So.2d 270 (Ala. 1979) 1

San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973 10

Schick v. Reed, 419 U.S. 256 (1974) 15

Shapiro v. Thompson, 399 U.S. 618 (1969). 10

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, ___U.S.___ (1979). 15, 20

(Stanlislaus) Roberts v. Louisiana, 428 U.S. 325 (1976) . 14

Trop v. Dulles, 356 U.S. 86 (1958). 16

Tumey v. Ohio, 273 U.S. 510 (1927). 19

United States v. Tsanas, 572 F.2d 340 (2d Cir.), cert. denied, 435 U.S. 995 (1978). 8

United States ex rel. Powell v. Pennsylvania, 294 F.Supp. 849 (E.D. Pa. 1968), appeal dismissed, 425 F.2d 267 (3d Cir. 1970). 8

Ward v. City of Monroeville, 409 U.S. 57 (1972) 19

Wardius v. Oregon, 412 U.S. 470 (1973). 19

Warren v. State, 197 Ala. 313, 72 So. 624 (1916). 6

Witherspoon v. Illinois, 391 U.S. 510 (1968). 14, 15, 16, 18, 19, 23

Woodson v. North Carolina, 428 U.S. 280 (1976). 9, 11, 12, 14, 17, 18, 25

Zablocki v. Redhail, 434 U.S. 374 (1978) 10

TREATISES:

8A Moore's Federal Practice ¶31.03[1] (2d ed., Sept., 1978 revision). 8

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS:

Ala. Const. Art. 6.13 (as amended by Amendment No. 328) . 19

Ala. Code, § 12-22-241 (1975. 3

Ala. Code, § 13-1-70 (1975) 5

Page:

Ala. Code, § 13-1-73 (1975) 6

Ala. Code, § 13-1-74 (1975) 5

Ala. Code, § 13-1-90 (1975) 6

Ala. Code, §§ 13-11-1 through 13-11-9 (1975). 3

Ala. Code, § 13-11-2 (1975) 6, 15, 25

Ala. Code, § 13-11-2(a) (1975). 4

Ala. Code, § 13-11-3 (1975) 25

Ala. Code, § 13-11-4 (1975) 17, 19, 20

Ala. Code, § 13-12-2(b) (1975). 4

Ala. Code, § 13-17-1 (1975) 5

U.S. Const., amend. VIII . . . . . Passim

U.S. Const., amend. XIV . . . . . Passim

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

WAYNE EUGENE RITTER, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The petitioner Wayne Eugene Ritter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on July 6, 1979.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals in Evans and Ritter v. State, reported at 361 So.2d 654 (Ala. Cr. App. 1977) appears attached hereto as Exhibit B. The opinion of the Alabama Supreme Court in Evans and Ritter v. State, reported at 361 So.2d 666 (Ala. 1978) appears attached hereto as Exhibit C. The opinion of the Alabama Court of Criminal Appeals in Ritter v. State, reported at 375 So.2d 266 (Ala. Cr. App. 1978) appears attached hereto as Exhibit D. The opinion of the Alabama Supreme Court in Ritter v. State, reported at 375 So.2d 270 (Ala. 1979) appears attached hereto as Exhibit A, infra.

JURISDICTION

The final judgment of the Alabama Supreme Court was entered on July 6, 1979. A timely petition for rehearing was denied on September 7, 1979, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(1) Whether petitioner's death sentence deprives him of life without due process of law, or denied him the equal protection of the laws, in violation of the fourteenth amendment, or constitutes cruel and unusual punishment in violation of the eighth amendment, because it was imposed pursuant to Alabama's post-Furman, pre-Gregg enactment governing capital prosecution and sentencing, which has the following features:

(a) Lesser included offenses, although supported by the evidence, cannot be submitted to the jury in a criminal prosecution, with the result that the jury must either convict the defendant of the capital crime or acquit him altogether;

(b) Juries in capital cases are compelled to impose a death sentence upon every defendant found guilty of a capital crime without considering mitigating circumstances;

(c) The defendant's only outlet from this mandatory jury-fixed death sentence lies in the power of the trial judge to "refuse to accept the death penalty as fixed by the jury" after conducting a post-verdict hearing and considering, inter alia, "the fixing of the punishment at death by the jury."

(d) The provisions for appellate review do not empower appellate courts to vacate disproportional or excessive death sentences, and systematic comparative review in fact is not being performed.

(e) The various elements of this statute operate in tandem to compound its constitutional flaws.

(2) Whether the failure to the trial judge to charge the jury on the elements of robbery, an essential ingredient of the capital offense for which petitioner was convicted and sentenced to death, denied him due process of law.

STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Alabama's death penalty statute, Ala. Code § 13-11-1 et seq. (1975) which are reproduced in Appendix E.

STATEMENT OF THE CASE

Petitioner, along with a co-defendant John Louis Evans, was indicted under Alabama's 1975 death penalty statute for the first degree murder of Edward Nasser during the commission of the robbery. Prior to trial, petitioner made several attempts to enter a plea of guilty. However, because of the procedure mandated by state law, a jury was impanelled to determine the issue of guilt or innocence and, upon a finding of guilt, to sentence the defendant to death. See Prothro v. State, 370 So.2d 740 (Ala. Cr. App. (1979). At trial, petitioner freely admitted his participation in the robbery homicide and asked that the jury sentence him to die in the electric chair. The judge charged the jury on the elements of murder, (R. 223-225) but simply failed to instruct the jury as to the elements of the crime of robbery. (App. A, p. 6). No objection to the charge was made. In his charge, however, the court cautioned "you may not take the simple approach and say, if the defendant admits he did it, we go no further." (R. 223). After deliberating for fifteen minutes, the jury convicted petitioner and his co-defendant and sentenced them to death.

The post-jury verdict hearing, required by Alabama law, was held the next day. The court upheld the jury imposed sentence of death finding that

> The aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted.

(R. 246).

Under the Alabama Automatic Appeal Statute, Ala. Code § 12-22-241 (1975), see Boykin v. Alabama, 395 U.S. 238 (1969),

petitioner, through appointed counsel, challenged the constitutional validity of the Alabama death penalty law. On October 25, 1977, the Alabama Court of Criminal Appeals rejected petitioner's constitutional challenge and affirmed the conviction and death sentence of both petitioner and his co-defendant. (App. B, infra, p. 9). The Alabama Supreme Court, with Justice Jones and Shores dissenting, also rejected petitioner's constitutional attack on the authority of its opinion in Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, U.S. (1979), (App. C, infra, p. 2), but remanded petitioner's case to the Court of Criminal Appeals for a determination of whether the statutorily reuqied "intent to kill" had been erroneously supplied by the felony murder doctrine.[1/] On August 9, 1978, the Alabama Court of Criminal Appeals again affirmed petitioner's conviction and sentence of death finding that the petitioner's "active participation in the Nassar murder supplies the requisite intent for an intentional killing" required by the law. (App. D, infra, p. 2). The court also rejected petitioner's renewed constitutional challenge to the death penalty law.

On July 6, 1979, the Alabama Supreme Court affirmed the decision of the Alabama Court of Criminal Appeals on the intent issue. The Court also ruled that the trial judge's failure to charge the jury on the elements of robbery was error without injury and further that whatever error occurred had been waived. (App. A, infra, p. 7). A timely application for rehearing was denied without opinion on September 7, 1979.

1/ Ala. Code, § 13-11-2(b) (1975) states that "Evidence of intent . . . shall not be supplied by the felony murder doctrine.

HOW THE FEDERAL CONSTITUTIONAL ISSUES WERE RAISED AND DECIDED BELOW

Petitioner's federal constitutional challenges to the Alabama death penalty law were briefed and argued before the Alabama Court of Criminal Appeals and before the Alabama Supreme Court. Both courts rejected the arguments on the authority of Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, ___U.S.___ (1979). See App. B, infra, p. 9; App. C, infra, p. 2 and App. D, infra, p. 3). Petitioner's specific contention concerning the failure of the trial judge to charge the jury on the elements of robbery (Question presented II) was raised at petitioner's second hearing before the Alabama Supreme Court and denied. (App. A, infra, p. 7).

REASONS FOR GRANTING THE WRIT

I. Alabama's Statutory Death-Sentencing Procedure Raises Substantial and Literally Vital Federal Constitutional Questions, For Its Provisions Are Inconsistent With the Applicable Capital Punishment Decisions of This Court.

A. Alabama's Unique Statutory Prohibition, Which Precludes Juries In Capital Cases From Considering Factually Supported Lesser Included Offenses Raises Substantial Questions Under the Due Process and Equal Protection Clauses and the Eighth Amendment.

The submission to the jury of lesser included offenses that are supported by the evidence is a commonplace of American criminal jurisprudence. Alabama's criminal law is not exception. As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with which he is charged. Ala. Code, § 13-17-1 (1975). This principle is extremely vital in the realm of murder where, by statute, an Alabama court is required in every case to charge on both first and second degree murder.[2/]

2/ Under Alabama law, first degree murder is "wilful, deliberate, malicious and premeditated killing." All other common law murder is murder in the second degree. Ala. Code § 13-1-70 (1975). A person convicted of first degree murder is automatically sentenced to life in prison while a person convicted of second degree murder is sentenced, at the discretion of the jury, to a term of imprisonment of not less than 10 years. Ala. Code, § 13-1-74 (1975).

Ala. Code, § 13-1-73 (1975). The court is required to charge on other lesser degress of homicide "if there is any reasonable theory from the evidence which would support the position." Fulghum v. State, 291 Ala. 7, 277 So.2d 886 (1973).[3/]

As this Court is aware, however, the Alabama death penalty statute expressly precludes the trial jury from considering lesser included offenses that can factually be found in a capital case. Ala. Code, § 13-11-2(a) (1975). It thereby foists upon a jury that believes that the defendant has committed some degree of criminally culpable homicide -- but not capital homicide -- the Hobson's choice of acquitting a killer or convicting and subjecting to death an individual who is not guilty beyond a reasonable doubt of the only crime on which the jury can render a verdict.

Aside from the quandary in which it places juries, the most striking feature of the lesser included offense provision of Alabama's capital statute is its uniqueness -- not only to Alabama law, but also to the criminal law of the remaining 49 states and the federal government.

This Court has recently granted certiorari to review the constitutionality of this feature of the Alabama death penalty statute. The question to be decided in Beck v. Alabama, 365 So.2d 1006 (Ala. 1978), cert. granted, 26 Cr.L. 4052 (October 9, 1979), appears to present an as-applied issue, the constitutionality of the operation of this statute where the evidence would have supported a verdict on a lesser-included offense.

The concerns which justified grant of certiorari on the as-applied issue, however, equally justify grant of certiorari to consider whether the preclusion of lesser-included-offense charges results in the facial invalidity of this statute. The

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3/ In Alabama, the other degress of homicide are manslaughter in the first degree and manslaughter in the second degree. Ala. Code, § 13-1-90 (1975). Whether a homicide amounts to murder in the first degree, murder in the second degree, manslaughter or self-defense "is always a question of fact for the jury, under proper instructions of the court." Warren v. State, 197 Ala. 313, 72 So. 624 (1916).

reasons for entertaining a facial attack on the statute can best be stated after a brief review of the constitutional flaws of this aspect of Alabama's statute.

1. The Due Process Violation.

Perhaps most saliently, the statute violates due process of law, by undermining the constitutional guarantee of proof beyond a reasonable doubt. The requirement that a state not impose criminal sanctions unless it has proved every element of the charged offense beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), is so basic that it is common knowledge among the people of the United States. Indeed the centrality of the "beyond a reasonable doubt" standard to criminal jurisprudence was recognized by the Supreme Court twice last term. Jackson v. Virginia, 99 S. Ct. 2781, 2787 (1979); Addington v. Texas, 99 S.Ct. 1804, 1808 (1979). In preventing juries from returning verdicts on lesser included offenses, the Alabama capital punishment statute denigrates the "vital role" played by the standard of proof beyond a reasonable doubt by encouraging juries to convict in spite of it. Concomitantly, the statute reduces the "risk of error" that should be borne by society by placing it squarely on the shoulders of capital defendants.

It takes no more than the most cursory knowledge of human behavior to apprehend the constitutionally precarious dilemma into which a significant number of Alabama capital juries must inevitably be thrust by their statutory inability to return a verdict on a lesser included offense. A jury that possesses a reasonable doubt as to one of the elements of the offense charged, but no doubt as to the defendant's guilt of a lesser offense that does not require proof of the questioned element, is likely, if precluded from convicting of the lesser offense, to resolve its doubts in favor of conviction of the greater. This is precisely why virtually every American jurisdiction entitles a defendant to request a lesser included offense instruction if there is any evidence to support it. In the context of a murder trial, the natural human revulsion

to all homicides only serves to heighten a jury's disinclination to declare an individual it believes has unjustifiably killed "not guilty."

Were common sense and simple logic not sufficient to compel this conclusion, this Court's judgment confirming it and Alabama's own experience in administering its death penalty statute certainly are. In Keeble v. United States, 412 U.S. 205 (1973), the court overturned a trial court's interpretation of a statutory system, which had precluded the giving of a jury instruction on a lesser included offense. Holding that this system, the federal Major Crimes Act, could not be construed to preclude a lesser offense instruction, the Court reasoned that a contrary construction would raise difficult constitutional questions. Id. at 213. It would expose defendants to a substantial risk of unwarranted conviction:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-213 (emphasis in original).[4/]

Alabama's experience administering its capital punishment statute confirms that the Supreme Court's concern over the intolerable pressure brought to bear on a jury powerless to convict of a lesser offense was not unfounded. Since the effective date of the Alabama statute, the resulting conviction rate has

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4/ The lower courts have also recognized that foreclosure of a lesser offense instruction, where otherwise appropriate, jeopardizes a defendant's fundamental right to fair jury fact-finding. See, e.g., United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), cert. denied, 435 U.S. 995 (1978); Joe v. United States, 510 F.2d 1038, 1042 (10th Cir. 1975); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D.Pa. 1968), appeal dismissed, 425 F.2d 267 (3d Cir. 1970).

Indeed, it is settled in federal practice that a defendant is entitled to a charge on available lesser included offenses at his request, if there is evidence to support the charge. 8A Moore's Federal Practice ¶ 31.03[1] at 31-15 (2d ed., Sept. 1978 revision).

been so startling that it can only be described as a veritible march to death row. During the first 33 months of the law's operation, Alabama prosecutors attained a 96 percent conviction rate in capital cases where the defendant pled not guilty and an 86 percent death sentence rate where the jury rendered a verdict of guilty and the issue of punishment was contested. These statistics deviate starkly from the expected norm found by the Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 295 n.31 (1976)(Opinion of Steward, Powell, and Stevens, JJ.) (hereinafter "Joint Opinion"): "Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20 percent of the cases." Although the wholly alien results achieved under the Alabama statute do not, standing alone, compel the invalidation of the statute, the do highlight the constitutionally unacceptable manner in which the statute must be working and underscore the need to overturn it.[5/]

2. The Equal Protection Violation.

Of all Alabama's criminal defendants, only those charged with a capital offense are denied the protection of a lesser included offense instruction. Consequently, capital defendants must defend not simply their liberty, but their very lives, without an important procedural safeguard afforded every other Alabama defendant -- a safeguard integral to fostering jury faithfulness to the standard of proof beyond a reasonable doubt. The lesser offense preclusion of Alabama's death penalty statute thus infringes upon two rights: the right to life and the right to unprejudiced jury fact-finding on the issue of guilt.

5/ Alabama's preclusion of jury consideration of lesser included offenses also deprives a capital defendant of the right to trial by jury guaranteed him by the fourteenth amendment's due process clause. Duncan v. Louisiana, 391 U.S. 145 (1968). Where a legislature recognizes that different degrees of criminality -- and different punishments -- should attach to the same basic act (here the killing of another human being), and that those differences turn on factual determinations, the power to determine that the facts warrant conviction only of a lesser offense cannot, without the defendant's approval, be taken from the jury.

Both of these rights are "fundamental;" that is, they are explicitly or implicitly guaranteed by the Constitution." San Antonio Indpdt. School District v. Rodriquez, 411 U.S. 1, 33-34 (1973). The right of all persons to life is explicitly guaranteed in the fifth and fourteenth amendments. The right of an accused to unprejudiced jury fact-finding is implicit in the due process clause. In re Winship, 397 U.S. 358 (1970); Cf. Keeble v. United States, 412 U.S. 205 (1973).

Because of its discriminatory impact on these fundamental rights, Alabama's capital punishment statute must be strictly scrutinized to determine whether it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). See also Zablocki v. Redhail, 434 U. S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 338-343 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972).

The only interest that Alabama has asserted in support of the statute's preclusion of lesser offense instructions is the need to comply with the Supreme Court's ruling in Furman by controlling undue jury discretion and nullification in capital cases.[6/] This objective is insufficient to sustain the law. Gregg and its companion cases squarely held that the concerns Furman expressed for consistent capital sentencing could be satisfied by capital punishment statutes that permit juries to consider lesser included offenses.[7/] The death penalty laws of Georgia, Florida and Texas upheld in those cases clearly demonstrate that there is a "less restrictive means" available to meet Alabama's objective of having a capital sentencing structure that is consistent with the Constitution. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Zablocki v. Redhail, 434 U.S. 374, 388, (1978). Accordingly, Alabama's preclusion of lesser included offense verdicts only in capital cases violates the Equal Protection Clause.

6/ Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama, No. 78-5696 (October Term, 1978), at 24.

7/ Gregg v. Georgia, 428 U.S. 153, 163 , 199 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter Joint Opinion); Proffitt v. Florida, 428 U.S. 242, 254 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter Joint Opinion); Jurek v. Texas, 428 U.S. 262, 274 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter Joint Opinion).

3. The Eighth Amendment Violation.

Gregg and its companion cases establish that under the eighth amendment, the constitutionality of the death penalty for murder cannot be evaluated apart from the procedures leading to its imposition. As we have shown, Alabama's practice of barring jury consideration of lesser included offenses in capital cases subverts the fact-finding process and undercuts the standard of proof beyond a reasonable doubt. Far from being inconsequential, these deficiencies have resulted in conviction and death sentence rates that are nothing short of astounding.

The uniqueness of Alabama's lesser offense preclusion is perhaps the most eloquent testimony to its unfairness. Other states were not doubt deterred from incorporating a similar provision into their own capital punishment statutes by their anticipation of the likely response of jurors to it -- an anticipation that Alabama's experience has proved deadly accurate.[8/] Both the avoidance by every other state of the lesser offense preclusion and its unpopularity with jurors are highly significant under the Eighth Amendment, for "legislative enactments and jury determinations" are substantial indicia of "contemporary standards regarding the infliction of [capital] punishment." Woodson v. North Carolina, 428 U.S. 280, 288 (1976)(Joint Opinion).

In contrast with the overwhelming evidence that Alabama's lesser offense preclusion does not comport with "contemporary standards of decency,"[9/] there is virtually no evidence -- and Alabama has offered none -- of societal acceptance of a capital punishment scheme that, like Alabama's, tells juries they must either kill a defendant or set him free. Alabama's statute is thus invalid under the eighth amendment.

8/ Jurors' reaction to this statute is poignantly illustrated in Justice Jones' dissent in Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, 59 L.Ed. 2d 83 (1979), in which he quotes excerpts from the voir dire of the jury in that case. Id. at 649.

9/ Woodson v. North Carolina, 428 U.S. 280, 294-295 (1976) (Joint Opinion).

4. The Basis for Reviewing the Facial Validity of the Statute.

This Court has firmly adhered to a "traditional rule" in constitutional adjudication, which requires that litigants base their pleas solely on injury to their own rights. The Court has, however, recognized exceptions to this rule. In so doing, it has acted on "the most 'weighty contervailing considerations.'" Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). Those considerations are present here.

The most significant factor is, of course, that lives hang in the balance.

> [D]eath is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-358 (1977)(Plurality Opinion). Because of this quantitative and qualitative difference between death and all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(Joint Opinion). Accordingly, "[w]hen a defendant's life is at stake, the [Supreme] Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976)(Joint Opinion).

It cannot be said that Alabama's death penalty statute requires every safeguard to be observed. Its defects, as outlined above, are profound. Death penalty defendants are singled out for trial under procedures which "stack the deck" against them, procedures which are subject to challenge on due process, equal protection and eighth amendment grounds. These elements of the statute so undercut the rationality of the sentencing process that they assure that almost any decision can be, or appear to be infected with "caprice or emotion."

Assuming, arguendo, that some individuals sentenced under a statutory scheme as flawed as this one may be sentenced without caprice or emotion, it might be said that the statute, as applied in those cases, should not be overturned. The surface logic of this proposition is belied by the impossibility of identifying which individuals were properly sentenced. Precisely because the statute is so skewed, no reviewing court will ever be able to conclude that a particular defendant's conviction was free of caprice. A reviewing court may decide that a particular defendant could have properly been convicted and sentenced to death, but it will not be able to say that the jury and judge who in fact adjudicated the defendant's case were reasoning in a constitutionally acceptable manner. Surely a conviction which might well have been premised on any one of several theories, one of which is unconstitutional, cannot stand. Every case arising under this statute will be in precisely this posture.

Petitioner does not suggest that a death penalty statute is unconstitutional merely because it is capable of unconstitutional application, for no statute could escape such a proscription. Particularly in this sensitive field, however, it is essential that the courts assure that the statutes under which individuals may be executed are fundamentally sound, in addition to scrutinizing any individual claims of improper application. Broadly speaking, this has been the courts' practice throught this decade's reconsideration of the constitutionality of the death penalty.[10/] This practice should continue, and should entail a consideration by this Court of the facial validity of Alabama's bizarre preclusion of consideration of lesser-included offenses.

10/ The courts have followed this course in other fields as well. See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel required whenever imprisonment imposed); Miranda v. Arizona, 384 U.S. 436 (1966)(establishing uniform safeguards against violation of fifth amendment rights); cf. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)(holding vagrancy statute unconstitutionally vague because of its lack of fair notice and encouragement of "arbitrary and erratic arrests and convictions").

B. The Role Alabama Has Assigned the Jury, Compelling It to Impose a Death Sentence Upon Every Defendant Convicted of a Capital Crime While Precluding It From Considering Mitigating Circumstances, Raises Substantial Questions Under the Eighth and Fourteenth Amendments.

Ala. Code, § 13-11-2(a) (1975), mandates that if the jury finds a defendant charged with any of the enumerated offenses guilty, "it shall fix the punishment at death." (Emphasis added.) The statute thus forces the jury in a capital case to view itself as a sentencing authority and contemplate the enormity of the consequences of a guilty verdict while simultaneously denying the jurors any lawful channel by which to give substance to those considerations that must necessarily affect any rational human being's decision that one of his fellows must live or die. Alabama's expectation that its capital juries can disregard the ostensibly lethal consequences of a guilty verdict in determining guilt or innocence is unconstitutionally unrealistic. Its insistence that its capital juries approve a death sentence they have been statutorily precluded from properly evaluating perpetrates an unconstitutional charade. Quite simply, the Alabama statute encourages the most constitutionally infirm aspect of jury participation in a capital sentencing scheme -- "unguided and unchecked jury discretion," Woodson v. North Carolina, 428 U.S. 280, 302 (1976)(Joint Opinion) -- while denying the jury an opportunity to perform its most constitutionally compelling function in capital cases -- "maintain[ing] a link between contemporary community values and the penal system," Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968). This compounded misuse of the jury violates the eighth and fourteenth amendments.

Prior decisions of this Court repeatedly emphasized the importance of the avoidance of unbridled jury discretion. See Woodson v. North Carolina, 428 U.S. 280, 302 (1976)(Joint Opinion); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 334-35 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(Hereinafter "Joint Opinion"); Furman v. Georgia, 408 U.S. 238, 257

(1972)(Douglas, J., concurring); id. at 310 (Stewart, J., concurring); id. at 313 (White, J., concurring).

As detailed in the joint opinion in Woodson, a review of the history of the administration of capital punishment statutes in this country convincingly establishes that when forced to determine guilt or innocence under a statute that seemingly makes death a necessary consequence of conviction,[11/] American juires "have, with some regularity, disregarded their oaths and refused to convict. . . ." 428 U.S. at 293.

Such juror lawlessness would appear to be inevitable under the Alabama statute since § 13-11-2 compels a jury that has found a defendant guilty of a capital crime "to fix the punishment at death." Faced with the prospect of being required to order the termination of lives they believe should be spared, Alabama juries can be expected to refuse to convict some unquestionably guilty defendants, even if infrequently. Ironically, other juires, as already noted, can be expected to convict defendants whom they do not believe to be guilty of capital murder, so as to avoid their escaping all punishment. The interplay between these two features unquestionably generates the unguided and unchecked jury discretion condemned in Woodson.

The arbitrariness of the jury's actions is aggravated both by the absolute absence of guidelines for its decision, Jacobs v. State, 361 So.2d 640, 643 (Ala. 1978), cert. denied, 59 L.Ed.2d 83 (1979), and by the paucity of information on which the jury must act. Aggravating and mitigating circumstances, under Alabama law, are considered by the trial judge at a post-verdict sentencing hearing. The jury fixes its sentence at death when it decides the accused's guilt. Thus

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11/ Because both federal and state governments have, since the country's inception, provided the opportunity for executive clemency, see Gregg v. Georgia, 428 U.S. 153, 199-200 n.50 (Joint Opinion); Schick v. Reed, 419 U.S. 256 (1974); Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978) cert. denied, 59 L.Ed.2d 796 (1979), it is doubtful that any American capital punishment law has been mandatory in any absolute sence. What is, therefore, crucial in assessing whether a death penalty statute operates in a constitutionally impermissible manner is the jury's perception of the consequences the statute attaches to its decisions.

Alabama, while compelling its juries to place their imprimatur on all capital sentences, requires them to do so on a record often or always lacking "essential . . . information about the individual defendant[s] whose fate [they] must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976)(Opinion of Stewart, Powell, and Stevens, JJ.)(Joint Opinion). The jury's role in sentencing is reduced to an ill-informed and unreviewable exercise of its power to affect sentence by skewing the decision on guilt.

It is no answer to say, as the Alabama Supreme Court has said, that the post-jury-verdict judicial hearing on aggravating and mitigating circumstances remedies this deficiency. Whether Alabama's juries have no real sentencing role at all, as this argument would have it, or have a lawless and arbitrary role, as logic suggests, Alabama's statutory scheme starkly presents the substantial question of the constitutionality of imposing the death penalty without meaningful, lawful participation by the community through the medium of the jury.[12/] Because the eighth amendment's meaning is informed by "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), and because juries "express the conscience of the community on the ultimate question of life or death," Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), Alabama's system is, for this reason as well as the others outlined here, unconstitutionally flawed.

The post-jury-verdict judicial hearing, moreover, is far from a meaningful check on the arbitrariness of the jury's sentencing role. The existence of the post-verdict hearing can hardly improve the jury's decisionmaking, since Alabama law makes no provision for informing the capital jury of the trial judge's role in sentencing. If jurors do become aware of the judge's role, their sence of accountability is if anything

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12/ One formulation of this question was included in the grant of certiorari, but not ultimately decided, in Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978).

likely to be attenuated. The entire sentencing process is thereby made less responsible, not more reliable.

Nor will the judge's review be a reliable safeguard if the jury's decisionmaking has not been adequate. The community pressure on the court not to overturn a jury-fixed sentence of death will be substantial.[13/] The statute itself, moreover, permits the trial court to sentence a capital defendant to life imprisonment without parole only if, "after weighing. . . the fixing of the punishment at death by the jury," the judge "refuse[s] to accept the death penalty as fixed by the jury." Ala. Code, § 13-11-4 (1975). Finally, the trial judge does not review the jury's verdict in any meaningful sense. He has no more capability than his North Carolina and Louisiana counterparts had to "check arbitrary and capricious exercise of [the jury's] power. . . ." Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(Joint Opinion). If the jury votes for death, the trial judge may choose to supersede it; but his choice cannot be made upon the basis of any understanding of its unfathomable verdict. In short, as Justice Jones wrote in dissent in Jacobs v. State, 361 So.2d 640, 650 (Ala. 1978), "the judge's subsequent consideration of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed."

C. Alabama's Procedure of Deferring the Trial Judge's Consideration of Aggravating and Mitigating Circumstances Until After the Jury Has Mandatorily Imposed a Sentence of Death Infringes a Capital Defendant's Right to Unprejudiced Sentencing in Violation of the Eighth and Fourteenth Amendments.

It is clear that "in capital cases the fundamental respect for humanity underlying the eighth amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280,

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13/ See Section I.C. infra.

304 (1976). It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). Any capital sentencing procedure then, must assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and must comport with fundamental fairness, Witherspoon v. Illinois, 391 U.S. 510 (1968). Alabama's sentencing process fails on both counts.

An Alabama trial judge comes to the "constitutionally indispensable part of the process of inflicting the penalty of death" only after a jury verdict has been publicly pronounced -- and publicized -- which sentences the defendant to die without consideration of mitigating circumstnaces. The judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of "refusing to accept" a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due. Such a procedure is equivalent, at the sentencing stage, to beginning a trial on the issue of guilt or innocence by publicly proclaiming that the defendant is guilty and that a trial will not be held to determine whether he should be found guilty.

Indeed, Alabama's death sentencing procedure is worse, because the pre-announced verdict of death carries the imprimatur of a jury of twelve citizens who, in public contemplation, appear to have sat in judgment on the case even though they have not in fact observed federal constitutional standards in fixing the sentence of death -- standards which require that the sentencing agency "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," Jurek v. Texas, 428 U.S. 262, 271 (1976)(Joint Opinion). The resultant pressure has already been felt. Justice Jones, in dissent in Jacobs v. State,

361 So.2d 640, 650 (Ala. 1978), took note of the "outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death." See id. at 650-51 n.3.[14/] A procedure which compels the judge to place himself in a publicly unfavorable light in order to do his minimal constitutional duty[15/] is too fraught with peril to be permitted consistently with due process,[16/] and too unreliable to pass eighth amendment muster.

Even if a judge were able and willing to disregard the jury sentence of death, the statute specifically instructs him to consider it. As noted in Section I.B., supra, the trial judge is directed to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury," § 13-11-4 (emphasis added). A system which so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinois, 391 U.S. 510, 523 (1968), results in a distortion of "the balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973). Where the defendant's life is at stake, it also ignores the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion).

14/ Alabama judges -- both trial and appellate -- are elected. Ala. Const., Art. 6.13, as amended by Amendment No. 328. They are thus not likely to be completely insensitive to this "outcry." Yet this system's decisions can only be valid where individual judges are able to ignore such criticism. It is disturbing, therefore, that only two judges were responsible for five of the seven cases in which (as of May, 1979) death sentences had been reduced to life imprisonment.

15/ Such a process embroils the judge in the passions of the day and forces him to "assume primary responsibility in chosing between competing political, economic and social pressures." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

16/ Cf. Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). See also Gardner v. Florida, 430 U.S. 349, 403 ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner . . . However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed."); Johnson v. Mississippi, 403 U.S. 212 (1971); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

Because of the pressures brought to bear on the sentencing process, it is essential that the capital defendant be protected at this stage by a proper burden of proof. As Gardner v. Florida, 430 U.S. 349 (1977), and Presnell v. Georgia, 99 S.Ct. 235 (1978), have demonstrated, the "fundmental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Id. at 236-37. It would seem that the standard of proof beyond a reasonable doubt which In re Winship, Addington v. Texas, and Jackson v. Mississippi have all deemed basic to criminal due process, should accordingly apply in full force to determinations made during the sentencing phase of a capital case.[17/]

Alabama's statute, however, merely requires that a trial judge who fixes the punishment at death list "one or more of the aggravating circumstances . . . which it finds exists," and "[a]ny of the mitigating circumstances . . . which it finds insufficient to outweigh the aggravating circumstances." Ala. Code, § 13-11-4 (1975). The state courts have not construed this statute to require proof beyond a reasonable doubt.[18/] This failure would be a basis for certiorari in its own right, but it is particularly significant in light of the other flaws in the Alabama sentencing process.

17/ The Georgia, Florida and Texas statutes which were upheld by the Supreme Court all require proof of aggravating circumstances beyond a reasonable doubt, either by their own terms or by interpretation of the highest appellate court of the state in questions. See Gregg v. Georgia, 428 U.S. 153, 166 n.9 (Joint Opinion); Jurek v. Texas, 428 U.S. 262, 269 (Joint Opinion); Spinkellink v. Wainwright, 578 F.2d 582, 610 (5th Cir. 1978), cert. denied, ___ U.S. ___ (1979).

18/ The state court decisions addressing the burden of proof qyestion are elusive at best, see, e.g., Kyzer v. State, ___ So.2d ___, 6 Div. 655, manuscript opinion at 13-15 (Ala. Crim. App. August 21, 1979).

D. Alabama's Failure to Provide a System of Comparative Review of Sentences and to Empower Its Appellate Courts to Vacate Death Sentences in Appropriate Cases Raises Substantial Questions Under The Eighth Amendment.

In order to pass constitutional muster, a death penalty sentencing scheme must eliminate the arbitrary and capricious application of the death sentence. An important component of a reliable, and thus constitutionally acceptable sentencing scheme is "prompt judicial review of the [sentencing] decision in a court with state-wide juridiction . . . [as] a means to promote the evenhanded, rational, and consistent imposition of death snetneces under law." Jurek v. Texas, 428 U.S. 262, 276 (1976) (Joint Opinion). This appellate review is constitutionally necessary to "assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976)(Joint Opinion), and "to ensure that [death sentences] are consistent with other sentences imposed in similar circumstances." Proffitt v. Florida, 428 U.S. 242, 253 (1976)(Joint Opinion).

In its 1976 decisions, this Court observed that in the context of reviewing capital cases, two distinct features of appellate review assume special significance. First, the Court noted with approval that both the Georgia and Florida schemes provided for the comparative review of death sentences to determine "whether the [death] sentence [in each case] is disproportionate compared to those sentences imposed in similar cases," Gregg v. Georgia, 428 U.S. 153, 198 (1976)(Joint Opinion);[19/] Proffitt v. Florida, 428 U.S. 242, 251 (1976) (Joint

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19/ The Georgia appellate scheme for comparative review is extensive. See Gregg v. Georgia, 428 U.S. 153, 166-68 (Joint Opinion); id. at 223-24 (White, J., concurring). The court is required to compare "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." Id. at 198.

Opinion).[20/] Second, the Court attached constitutional importance to the power of state appellate courts to vacate death sentences in cases where they affirm the conviction. As the Supreme Court noted in Proffitt (428 U.S. at 253):

> The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date.

When the Alabama appellate review system in death cases is measured by these benchmarks, it falls far short of the constitutional standard. The Alabama death statute does not empower Alabama courts to exercise comparative proportional appellate review or to vacate a death sentence in a case where the conviction is fair but where the death sentence imposed is excessive, arbitrary or disproportionate when compared to the sentence in other cases. As the Court of Criminal Appeals noted recently, "this Court does not have the statutory authority to reduce the penalty and resentence the appellant itself." Lewis v. State, 4 Div. 611 (Alabama Court of Criminal Appeals, September 4, 1979).

The Court's statement of its practice was correct, for in over 30 opinions under Alabama's new death penalty statute is has not reduced or vacated any, though in a limited number it has remanded for written factual findings and/or new sentencing hearings. The Alabama Supreme Court similarly has not asserted or exercised a power to reduce or vacate sentence. Without this power, the appellate courts of the state have no effective

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20/ As the Supreme Court noted in Proffitt v. Floirda, 428 U.S. at 258-59 (Joint Opinion), the Florida Supreme Court has adopted, without statutory requirement, a comparative proportionality review similar to that of Georgia. Although the Supreme Court did not allude to any mechanism for the comparative review of death sentences in Jurek, at the time Jurek was decided only two cases had worked their way through the Texas appellate system, Jurek v. Texas, 428 U.S. 262, 270 (Joint Opinion). The Court simply refused to assume that Texas' system of appellate review would work in an unconstitutional manner. In Alabama, on the other hand, the evidence is in. And it does show that Alabama's appellate courts do not engage in comparative review.

means of assuring proportionality of sentences. The opinions of both the Court of Criminal Appeals and the Supreme Court reflect, moreover, that these courts view their role as the correction of error,[21/] rather than a comparative review.

E. The Overall Operation of Alabama's Death Penalty Statute Is So Prejudicial to the Rights of a Capital Defendant at Both the Guilt and Sentencing Stages as to Raise Substantial Questions Under Both the Eighth Amendment's Cruel and Unusual Punishment Clause and the Due Process Clause of the Fourteenth Amendment.

Although the Supreme Court's pronouncements governing the procedures a State must follow before it can constitutionally deprive a citizen of his life "have not ... always been easy to decipher," Lockett v. Ohio, 438 U.S. 586, 602 (1978)(plurality opinion), one principle has remained unchanged, unchallenged and impregnable: "[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 520-22 n.20 (1968). In enacting the death penalty statute challenged here, Alabama has not fulfilled its obligation to keep the scales of justice true. Instead, with a hand that grows increasingly heavy at each successive stage of a capital case, Alabama plunges the balance -- and the defendant whose life is dependent upon it -- toward death. Each of the constitutional flaws described above compoinds the effect of the others. The result is that neither trial jury nor trial judge, nor the appellate courts, is an effective bulwark against the irrational application of the death penalty.

For those defendants a prosecutor decides to charge with a capital crime, the Alabama death penalty statute is a veritable engine of death which flies in the face of settled constitutional principles. This Court should review this patently unconstitutional scheme.

21/ See, e. g., Cade v. State, 4 Div. 640, Manuscript Opinion at 43 (Ala. Cr. App. November 21, 1978).

II. The Decision Below, Finding No Error in the Trial Judge's Failure to Charge on the Elements of Robbery, Decides a Substantial Federal Question in a Manner Inconsistent With the Applicable Decisions of this Court.

Under Alabama law, a defendant may not plead guilty to a capital charge and then be sentenced by a judge. "Only a jury can make a factual determination of guilt and only a jury can fix the punishment at death." Prothro v. State, 570 So.2d 740, 747 (Ala. Cr. App. 1979).

Prior to trial, petitioner attempted to enter a plea of guilty in exchange for a death sentence. (R. 59), but the trial judge, pursuant to state law, empanelled a jury to hear the state's case against petitioner.

The trial, as held, was not an abbreviated proceeding, but rather a full blown trial on the merits of the case. The trial judge conducted extensive voir dire and excused jurors who demonstrated bias. (R. 81; R. 81-94). Both state and defense gave opening and closing statements.

Defendant's counsel made timely objections and extensively cross-examined the state's witnesses. The trial did not proceed as a ratification of petitioner's guilty plea, but rather proceeded, as any other trial, with the submission of the issue of guilt or innocence to the jury. To be sure, petitioner testified as to his involvement and asked that the jury sentence him to death. However, the judge emphasized in this charge that the state was still required to prove each and every element of the charge beyond a reasonable doubt and further cautioned the jury

> You may not take the simple approach and say, if the defendant admits he did it, we go no further.

(R. 223). In his charge, however, he completely omitted any charge on the elements of robbery, even though petitioner was charged with robbery murder.[22/] The jury then found petitioner

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22/ Under Alabama law the elements of robbery are: a) the unconsented taking of the property of another, (b) from his person or his presence, (c) by violence or by putting in fear and, (d) with larcenous intent. E.g., Martin v. State, 5 Ala. App. 405, 286 So.2d 80 (Ala. Crim. App. 1973).

guilty of robbery-murder with no instructions to support such a finding.

By law, petitioner, no matter how outrageous or bizarre his conduct may have been, had to have a jury determine whether he was guilty of the capital offense charged in the indictment and thus whether his punishment should be fixed at death. Ala. Code, § 13-11-2,3 (1975); Prothro v. State, 370 So.2d 740 (Ala. Cr. App. 1979). It is axiomatic that such a jury determination must comport with the dictates of due process. Gardner v. Florida, 430 U.S. 349 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970). Because that process involves the death penalty, the eighth amendment is also implicated. Woodson v. North Carolina, 420 U.S. 280 (1976).

In petitioner's case, the process for determining whether he should live or die was fatally flawed because the fact finder, the jury, was never charged on an essential element of the crime. The constitutional implications of this failure merit review by this court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Alabama Supreme Court.

Respectfully submitted,

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THE OPINION IN RITTER V. ALABAMA HAS NOT BEEN FILMED. IT CAN BE FOUND AT 375 So. 2d 270.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when

the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the

aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

13-11-5. Conviction and sentence to death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)